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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

HARVEY F. EUGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

The Internal Revenue Service ("IRS") has only those powers granted to it by Congress. It has no inherent authority to issue an administrative summons in aid of its investigations. *United States* v. *LaSalle National Bank,* 437 U.S. 298 (1978). Section

7602 authorizes the IRS to summon a person to produce "books, papers, records, or other data." The Internal Revenue Code does not expressly empower the IRS to use its summons authority to compel the creation of documents which did not previously exist, including handwriting exemplars.

The narrow question presented by this case is whether the power to summon a person to "appear" and to produce "other data" impliedly encompasses the power to compel the execution of handwriting exemplars. The larger question is the extent to which Congress has authorized the use of investigative techniques more commonly found in criminal investigations in situations which lack the safeguards of Fourth Amendment "probable cause" or authorization of compulsory process only by an impartial body such as the grand jury.

The cannons of statutory construction, such as *ejusdem generis*, suggest that the phrase "other data" is limited to like subject matter as the preceding specific enumeration of items subject to be examined and summoned ("books, papers, records"). Such a limitation does not exhaust the genus of items which may be summoned. For example, existing memoranda, tape recordings and photographs may contain information relevant to a pending tax inquiry, yet they do not fit within one of the enumerated categories. Hence, they are "other data."

This conclusion is buttressed by the legislative history of §7602 and by the history of the summons power. In enacting §7602 Congress stated that it contained "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). Reference to the relevant provisions of the Internal Revenue Code of 1939, and the preceding Internal Revenue Acts which it codified, confirms that the summons power is limited to existing, tangible items. For the first fifty years of its history, the IRS was limited to summoning the production of books of account, books and papers. In 1919, the power was extended to include "books, papers, records or memoranda." Int.Rev.Act of 1919, ch. 18, §1305, 40 Stat. 1057, 1142. Concurrently with that enactment, the district courts were given jurisdiction to enforce a summons calling for the production of "books, papers, records, or other data." *Id.*, §1318, 40 Stat. 1057, 1147. In no reported case prior to 1954 did the IRS ask for or receive handwriting exemplars (or any other non-testimonial evidence) or documents which were not in existence on the date of the summons.

There are good reasons to limit the use of criminal investigative techniques in administrative proceedings without the express authorization of Congress. The issuance of a summons does not require the showing of probable cause. *United States* v. *Powell*, 375 U.S. 48, 57 (1964). Hence, a taxpayer receives no pro-

tection from the Fourth Amendment, as he would if the investigation were being conducted by the police. The summons is not issued by a neutral body composed of a taxpayer's fellow citizens, as is a grand jury subpoena. Hence, he is subject to the command of an officer charged solely with the ferreting out of criminal and civil tax violations, with no intervening protecting body to safeguard his interests from abuse.

We submit that nowhere in the text of §7602, its legislative history, or the history of the summons power is there evinced an intention by Congress to grant to the IRS the power to use any constitutionally permissible investigative technique to obtain any constitutionally permissible evidence. Especially where implied powers are asserted, this Court should be careful to distinguish between the authority an agency desires and the authority an agency actually has. If the IRS needs the power to compel execution of handwriting exemplars, it should address those arguments to the Congress. The summons power remains at present, as it was in the past, limited to the production of existing documents and materials which may be relevant to the statutory purposes of the inquiry.

ARGUMENT

THE INTERNAL REVENUE SERVICE LACKS STATUTORY AUTHORITY TO COMPEL BY MEANS OF AN ADMINISTRATIVE SUMMONS THE EXECUTION OR CREATION OF DOCUMENTS THAT DO NOT ALREADY EXIST, INCLUDING HANDWRITING EXEMPLARS

A. Introduction

The narrow question presented by this case is whether Congress has given to the Internal Revenue Service ("IRS") the power to compel persons by means of an administrative summons to create documents which did not previously exist, including handwriting exemplars. Petitioners answer this question in the affirmative, based upon the broad premise that the IRS may use an administrative summons to obtain "any constitutionally permissible" information. Pet.'s Brief, p. 48. This necessarily raises the issue of the extent to which a Congressional grant of power to summon the production of books, papers, records or other data includes the power to use in administrative proceedings investigative techniques which are "constitutionally permissible" in other contexts, such as handwriting and voice exemplars, lineups and fingerprinting. The question is of great importance to the administration of the tax laws, for the IRS seeks to subject persons to substantially intrusive tech-

niques of investigation without the safeguards of either the showing of probable cause (as in criminal investigations) or authorization of the procedure by an impartial body (as in a grand jury).

The IRS is entirely a creature of statute. It has only those powers granted to it by Congress. The IRS has no inherent authority to issue an administrative summons in aid of its investigations.

We submit that on the basis of the text of Section 7602[1] and related statutes, the canons of statutory construction, the legislative history of the Internal Revenue Code of 1954, the historical development of the tax summons power and the purpose of the tax laws, Congress did not intend to grant to the IRS the full panoply of constitutionally permissible investigative techniques. Specifically, Congress did not give the IRS the power to compel citizens to create documents for the benefit of a tax investigation, including handwriting exemplars. The summons power is limited to compelling the production of existing documents and materials which may be relevant to the statutory purposes of the investigation.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, Title 26, United States Code, unless otherwise indicated.

B. The Text Of Section 7602 Does Not Authorize The Issuance Of A Summons To Compel The Creation Of Documents Including Handwriting Exemplars

The power of the Internal Revenue Service to issue an administrative summons is granted by Section 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant and material to such inquiry.

The question is one of statutory construction. As Mr. Justice Frankfurter said, "Though we may not end with the words in construing a disputed statute, one certainly begins there." Frankfurter, *Some Reflections On the Reading of Statutes,* 47 Colum.L.Rev. 527, 535 (1947). Therefore, it is necessary to examine in some detail the language and structure of the statutes dealing with the summons power.

It should be noted at the outset that nothing in Section 7602 expressly authorizes the IRS to use the summons power to order a person to create or manufacture a document which does not already exist. This is particularly significant in light of other provisions of the Internal Revenue Code which do specifically empower the IRS to designate documents which taxpayers and others must fill out or maintain. *See, e.g.,* §6001 (general power to require the keeping of records, rendering of statements and making of returns) and §6107(b) (requiring tax return preparer to make and retain a list identifying the taxpayers for whom a return was prepared).

The only portions of §7602 which are relevant to this case are subsections (1) and (2).[2] Subsection (1)

[2] The preamble to §7602 sets forth the statutory purposes for which a summons may be issued. Respondent does not contend in this Court that the summons was issued for an unauthorized purpose. *Cf. United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Subsection (3) relates to the taking of testimony. The giving of a handwriting exemplar is not a testimonial act. *Fisher v. United States,* 425 U.S. 391, 411 (1976); *United States v. Mara,* 410 U.S. 19 (1973).

empowers the IRS "to examine any books, papers, records, or other data" which may be relevant and material to the inquiry. None of the key words in the quoted phrase is defined by the Internal Revenue Code. Since these do not appear to be words of art, it is proper to give them their common meaning. It is not an unnatural or strained interpretation of the word "examine" to say that it is synonomous with the word "inspect." *Cf. Millard Hall,* 50 T.C. 186 (1968), *aff'd. sub. nom., Hall* v. *Commissioner,* 406 F.2d 706 (5th Cir. 1969) (no "examination" where office auditor merely discussed contents of records with appellate conferee). Since one cannot inspect something lacking a tangible form, logic dictates that the Secretary's power of examination is limited to items which presently have a physical existence.

Section 7602(2) authorizes the IRS to issue a summons to a person to produce "books, records, papers, or other data."[3] The purpose of this subsectionis to enable the IRS to compel the production of those

[3] Petitioner does not contend that the word "produce" is used in §7602 in the sense of "make" or "create." Given the purpose and context of the statute, it is apparent that the word "produce" has the meaning "to bring forward or to exhibit." *See Black's Law Dictionary,* p. 1374 (4th rev. ed. 1968).

items which the taxpayer or other person summoned refuses to produce voluntarily. It is elementary that "a section of a statute should not be read in isolation from the context of the whole [statute]." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Therefore, the items whose production may be compelled by means of a summons are the same items which may be examined under the authority of subsection (1). *United States* v. *Brown*, 536 F.2d 117, 121 (6th Cir. 1976).

"Books" generally refers to books of account, or similar formal records of financial transactions. *Cf. Hall* v. *Commissioner, supra; Geurkirk* v. *United States*, 354 F.2d 629, 631 (7th Cir. 1965) (construing §7605(b)); *In re Anderson*, 35 F.Supp 717, 719 (W.D.N.Y. 1940) (ledger of assigned accounts). The word does not refer to preliminary documents, such as trial balance sheets [*e.g., Jones* v. *Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962)] or informal records, *e.g., Klempner* v. *Glenn*, 82 F.Supp. 626 (W.D.Ky. 1949) (construing §41 of Int. Rev. Code of 1939). This interpretation is in accord with the history of the summons powers, which was originally limited to "books of account." *See, infra*, Part C.

"Papers" refers to a broader class of documents. Generally, the courts have said that papers relate to specific transactions, and include such items as deeds, contracts, plans, specifications, instruments, checkbooks, check stubs, cancelled checks and similar writings. *Cudahy Packing Co.* v. *United States*, 15 F.2d 133, 136 (7th Cir. 1926); *In re Hodge*, 205 F. 824, 825 (N.D.N.Y. 1913).

"Records," like "books," usually have reference to "serial, continuous and more permanent memorials of a concern's business and affairs, chronologically and systematically kept and arranged." *Cudahy Packing Co.* v. *United States, supra* at 136. More recently in *Nichols* v. *United States*, 325 F.Supp. 130, 134-135 (D. Kan. 1971), *aff'd.*, 460 F.2d 671 (10th Cir.), *cert. den.* 409 U.S. 966 (1972), a district court held that records meant written matter used to perpetuate knowledge of acts or events. *Nichols* was an action under the Freedom of Information Act, 5 U.S.C. §552, *et seq.*, to obtain access to various items being held by the National Archives relating to the assassination of President Kennedy, including certain personal property (*e.g.*, rifle, bullets, coat, etc.), histological preparations used in the autopsy, and written diagnoses or findings. Using the above-mentioned definition, the district court held that only the latter items were properly "records," within the meaning of the Act.

"Data" is the plural of "datum." It is commonly defined to mean "detailed information of any kind" or more simply, "information." Webster's *Third New International Dictionary*, 577 (1976 ed.). This is a rather vague and inconclusive term, which carries with it no suggestion that it refers to anything other than extant items. That reasonable persons can disagree as to the coverage of this term is illustrated by the divergence of the courts of appeal upon the very issue presented by this case. *Compare United States* v. *Brown, supra*, and *United States* v. *Davey*, 543 F.2d

996, 1000 (2d Cir. 1976) *with United States* v. *Rosinsky*, 547 F.2d 247, 253 (4th Cir. 1977) and *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).

Hence, it is appropriate to resort to other aids to determine the meaning of the phrase "other data." Useful tools in the search for meaning of statutes are the well-known canons of construction. They are, of course, in no true sense rules of law. They are, at best, as Mr. Justice Holmes called them, "axioms of experience." *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928). Intelligently applied, the canons of construction can throw valuable light upon the interpretation of the statute. *See Frankfurter, op. cit.* at 544-45. In this case, the principles of statutory construction suggest that Congress did not grant to the IRS the power to compel the creation of documents, including the execution of handwriting examplars.

One of the best known canons is the doctrine of *ejusdem generis* which states:

> [W]here general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. 2A Sutherland, *Statutes and Statutory Construction*, §47.17, p. 103 (4th ed. 1973).

Use of *ejusdem generis* is proper when the following five conditions are met: (1) there exists an enumeration by specific words; (2) the members of the enumeration constitute a class; (3) the class is not exhausted by the enumeration; (4) the general reference supplements the enumeration, usually following it; and (5) there exists no clearly manifested intent that the general term is to be given broader meaning than the doctrine requires. 2A Sutherland, *op. cit.*, §47.16, p. 109. The summons statute satisfies these prerequisites.

Section 7602 contains a listing of specific enumerated items ("books, papers, records") and concludes with a general term ("other data"). The enumeration constitutes a class consisting of tangible items already in existence. *See United States* v. *Brown*, *supra*, at 122; *United States* v. *Campbell*, *supra*, at 606. The general reference supplements the enumeration and follows it.

Petitioners suggest that the doctrine is inapplicable for failure to meet the third and fifth requirements. According to Petitioners, the genus of documentary evidence is exhausted by the enumeration of "books, papers [and] records." Pet.'s Brief on Merits, p. 36. Thus, the argument goes, there is nothing "essentially similar upon which the general words may operate" and the general words are rendered meaningless. *Id.* Petitioners' statement of the law is correct, but their factual premise is not.

There are a number of tangible, existing items which may be summoned, which nevertheless do not fall within the meaning of "books, records [or] pa-

pers." Hence, they must be "other data." Most obvious are "memoranda", or other informal writings or memorials of events or actions. The predecessor statutes to §7602 included memoranda in the specific enumeration of items which could be summoned. See Part C, *infra.* Another item of "other data" would be existing handwriting examplars. Indeed, the IRS has available to it handwriting exemplars executed by Respondent in connection with another investigation which it has not attempted to utilize. R. 18, 33-34, 37. Enumeration of other items is limited only by the imagaination. For example, photographs of property for which the taxpayer claims a casualty loss may be useful in reaching a value for the property. *See* §165. Tape recordings of meetings or telephone calls, to the extent they exist, could be useful to determine whether particular transactions were valid or a sham. *Cf., United States* v. *Nixon,* 418 U.S. 683 (1974).

The Congressional intent in enacting §7602 is clearly manifested in the brief legislative history of the statute, which states "[this section] contains no material change from existing law." H.R.Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S.Rep. No. 1622, 83d Cong. 2d Sess. 617 (1954). Existing law authorized a summons to compel the production of "books, papers, records, or memoranda" (§3614, Int.Rev. Code of 1939), "books" (§3615(a), Int. Rev.Code of 1939) and "books and papers" (§3654(a), Int.Rev. Code of 1939). All of these enumerated items refer to tangible, existing documents. No provision of the 1939 Code can

fairly be said to authorize a summons to compel the execution of a handwriting exemplar, or to create any other document. Clearly, the interpretation suggested by Petitioners, *i.e.,* "other data" equals "any constitutionally permissible information," would be a radical and material departure from prior law. Only by limiting the class of items to be summoned to existing things can the Congressional intent of preserving the meaning of prior law be effectuated.

Other canons of construction may also be useful here. For example, the rule of *noscitur a sociis* states:

> If the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words or phrases. Thus, where two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word. 2A Sutherland, *op. cit.,* §47.16, p. 101.

Applying this principle, the general words "other data" are limited by the special words "books, papers [and] records" to similar, *i.e.,* tangible and existing, items. In another case involving agency subpoenas, this Court applied the canon of *noscitur a sociis* to hold that the power of the Interstate Commerce Commission to inspect "accounts, records and memoranda" did not encompass the power to inspect "correspondence." *United States* v. *Louisville & N. R. Co.,* 236 U.S. 318 (1915).

In addition, the rule of construction known as *in pari materia* suggests that other statutes relating to the same subject matter may be of assistance in determining the meaning of a particular statute. For example, Sutherland notes that statutes which condemn the same acts are *in pari materia*. 2A Sutherland, *op. cit.* §51.03, p. 299. Section 7604(b) provides for an order of attachment as for a contempt when a person duly summoned under §7602 neglects or refuses to produce books, papers, records or other data. Section 7210 makes it a crime to neglect to produce "books, accounts, records, memoranda, or other papers" duly summoned.[4] Clearly, each of these items contemplates matters already in existence. Thus, the power to summon "other data" should be no broader than the power to punish a contumacious failure to comply.

Significantly, Petitioners do not assert that it has been the longstanding practice of the IRS to use an administrative summons to obtain non-testimonial evidence. *Cf. International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. ____, 58 L.Ed.2d 808, 820 (1979). The statistics cited by Petitioners in their brief go back only to mid-1977. Pet.'s Brief, p. 26 n.5. Petitioners have cited no reported case, and our research

[4] Neither section applies when the witness interposes good faith defenses to the summons. *Reisman v. Caplin*, 375 U.S. 440, 447-49 (1964). In *United States v. Becker*, 259 F.2d 869 (2d Cir. 1958), it was held that the government must prove a "wilful" failure to comply under §7210.

has revealed none, in which the IRS sought any type of non-testimonial, physical evidence prior to *United States* v. *Campbell*, 390 F.Supp. 711 (D.S.D. 1975), *aff'd*, 524 F.2d 604 (8th Cir. 1975).

The IRS has itself taken inconsistent positions concerning its powers under §7602. In this case it claims to be able to compel the execution of handwriting exemplars. However, the Internal Revenue Manual §5892.41(3) (November 22, 1978) states that an administrative summons

> should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers, and records. A witness cannot be required to prepare or create documents, including tax returns, not currently in existence.

The manual elsewhere states that the execution of handwriting exemplars is not the preparation or creation of a document. Internal Revenue Manual §4022.64(4) (March 28, 1977). It is apparent, however, that a handwriting exemplar is a document and does not come into existence unless the person summoned manufactures it. *United States* v. *Brown*, *supra* at 122.

Petitioners do point to cases such as *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973), in which the court ordered a tax return preparer to make a list of the identity of his clients, apparently without regard to whether such lists were in existence prior to

the issuance of the summons. Pet.'s Brief, p. 37. However, it appears that those decisions did not consider the contention that the IRS lacked the power to compel the making of documents through the use of an administrative summons. That particular issue with respect to tax return preparers is now moot in view of the enactment of §6107(b) which requires them to maintain such lists.

C. The Legislative History And Historical Development Of The Summons Power Indicates That Section 7602 Does Not Authorize The Issuance Of A Summons To Create Documents

The foregoing analysis of the text of §7602 is buttressed by the legislative history of that and related statutes, and by the historical development of the summons power. The legislative history of §7602 is brief, but definite. Both committee reports state that "[Section 7602] contains no material change from existing law." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). Thus, an understanding of the historical antecedents of the summons statutes is necessary to determine the present scope of the summons power.

The highlights of the historical development of the summons power are summarized by the following tables:

TABLE A

STATUTORY DEVELOPMENT OF IRS ADMINISTRATIVE SUMMONS POWER, 1864-1979

Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
1. "books of account" Int. Rev. Act of 1864, §14 Rev. Stat. 1873-74, §3173 "books, papers, accounts" and "books and papers" Int. Rev. Act of 1868, §49 Rev. Stat. 1873-74, §3163	application to district court for attachment as for contempt Int. Rev. Act of 1864, §14 Rev. Stat. 1873-74, §3175 [compare Int. Rev. Code of 1954, §7604(b)]
2. "books of account" Int. Rev. Act of 1913, §I Int. Rev. Act of 1916, §16	"production of books" Int. Rev. Act of 1913, §K Int. Rev. Act of 1916, §20

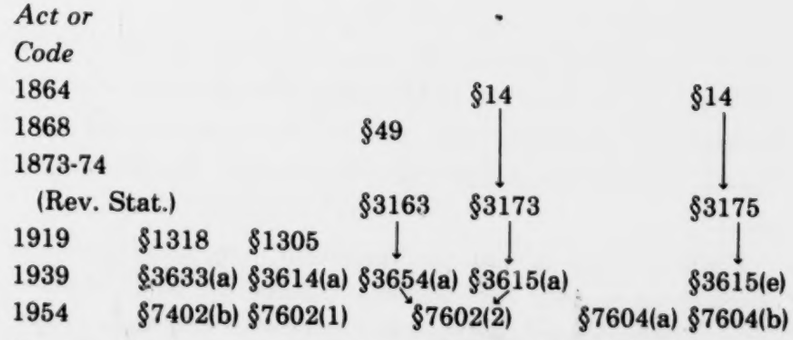
Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
3. "books, papers, records or memoranda" Int. Rev. Act of 1919, §1305 Int. Rev. Act of 1921, §1308 Int. Rev. Act of 1924, §1004 Int. Rev. Act of 1926, §1104 Int. Rev. Act of 1928, §618 Int. Rev. Act of 1934, §507	"books, papers or other data" Int. Rev. Act of 1919, §1318 Int. Rev. Act of 1921, §1310(a) Int. Rev. Act of 1924, §1025(a) Int. Rev. Act of 1926, §1122(a) Int. Rev. Act of 1928, §617(a)
4. "books, papers, records, or memoranda" Int. Rev. Code of 1939, §§3614 (a), (b) "books" Int. Rev. Code of 1939, §3615(a) "books and papers" Int. Rev. Code of 1939, §3654(a)	"books, papers, or other data" Int. Rev. Code of 1939, §3633(a)

Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
5. "books, papers, records, or other data" Int. Rev. Code of 1954, §7602	"books, papers or other data" Int. Rev. Code of 1954, §7402 (b) "books, papers, records, or other data" Int. Rev. Code of 1954, §7604(a)

Note: For clarity, complete citations are contained in the Table of Cases, Statutes and Other Authorities)

TABLE B

DERIVATION OF SUMMONS STATUTES



(Source: Table II, Int. Rev. Code of 1954, 68A Stat. 969)

In this Court's most recent opinion on the subject of IRS summonses, *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), it was noted that "Section 7602 derives, assertedly without change in meaning, from corresponding and similar provisions in §§3614, 3615, and 3654 of the 1939 Code." *Id.* at 310.[5] The Court relied heavily upon the historical antecedents of §7602 in concluding that Congress intended to permit administrative investigations of tax fraud with interrelated criminal and civil elements. *Id.* at 310-311 and nn. 13-14. Even those decisions which have sustained Petitioners' arguments have agreed that the 1939 Code authorized the summoning only of documents or items presently in existence. *See, e.g. United States* v. *Campbell, supra* at 606.

The contention that the phrase "other data" used in Section 7602 applies only to tangible, existing items is further supported by an examination of the statutory development of Sections 7402(b) and 7604(a). These sections confer jurisdiction upon the district court to enforce an IRS summons. Section 7402(b) differs slightly in wording from Section 7604(a). The former authorizes the district court to compel the production of "books, papers, or other data," while the latter uses the words "books, papers,

[5] Interestingly enough, the "assertion" was made by the government in *LaSalle*. *See* Petitioner's Brief, pp. 20-29, where the government, after an exhaustive review of the history of the summons power, concluded that Section 7602 remained unchanged in meaning from preceding statutes.

records, or other data." Both statutes derive from Section 3633 of the Internal Revenue Code of 1939, which provided:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, *or other data*, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, *or other data*. (Emphasis added).

Section 3614 of the 1939 Code authorized the IRS to examine "books, papers, records, or memoranda." Both the *Brown* and the *Campbell* courts agreed that this phrase contemplated existing, tangible documents. *United States* v. *Brown, supra* at 122; *United States* v. *Campbell, supra* at 606.

Sections 3615(a) and 3654(a) contained the summons provisions of the 1939 Code. The former authorized the IRS to

> summon any person to appear before [the collector] and *produce books* at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or other returns thereof. (Emphasis added.)

The latter provided:

> (a) *Collectors*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal

> revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, *books, papers, accounts,* and *premises,* to administer oaths, and to summon any person to produce *books* and *papers,* or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615. (Emphasis added.)

Although these statutes specifically mentioned only "books" and "papers" as the type of items which would be summoned, the courts have referred to the broader language of Sections 3614 and 3633 to determine the scope of the summons. For example, in *Stone* v. *Frandle,* 89 F.Supp. 222 (D. Minn. 1950), the taxpayer contended that the government could not summon stenotype notes of an arbitration proceeding because they were not books of account or the underlying documents which were reflected in such books. The court rejected this position and held that the government could require the production of "any writings or data which may bear upon the matter." *Id.* at 224. *Cf. Brownson* v. *United States,* 32 F.2d 844 (8th Cir. 1929) (production of telegram). The use of the word "data" in conjunction with the word "writing" suggests that the court considered them equivalent. Certainly nothing in the 1939 Code, or the cases decided under it, indicates that the language used there was intended to encompass intangible, non-testimonial evidence.

Moreover, the use of the phrase "other data" in the 1954 Code was not an innovation. It appeared in Section 3633(a) of the 1939 Code which, as noted previously, was the statute conferring jurisdiction upon the district court to enforce a summons. The 1939 Code was a codification of previous revenue acts,[6] which also used the phrase "other data." The district court's jurisdiction under the 1939 Code to compel production of "other data" could not exceed the power of the IRS to examine and summon documents. Therefore, "other data" as used in the 1939 Code, must have meant books, papers, records, memoranda and other items of a like nature. This is the position taken by the courts which enforced summons for such things as stenotype notes and telegrams.

Consequently, when Congress added the phrase "other data" to Section 7602 in 1954, it did not do so without a point of reference. The use of this much-disputed phrase not only made all the statutes related to summons uniform in phraseology, but also obviated such arguments as those put forth in *Stone* v. *Frandle, supra.* There was no attempt to broaden the reach of an IRS summons, despite the contrary assertions by Petitioners. The term had long been a part of the interal revenue acts and had an accepted meaning. Thus, Respondent respectfully suggests that Congress be taken at its word when it said the inclusion of the phrase "other data" in Section 7602 was not a material change from existing law.

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[6] S.Rep.No. 20, 67th Cong., 1st Sess. 1 (1939).

D. Section 7602 Authorizes The Use Of An Administrative Summons To Compel A Person To Appear Before the IRS Only For The Purpose Of Producing Books, Papers, Records Or Other Data, And For The Purpose Of Giving Testimony

Petitioners suggest that Section 7602 authorizes an administrative summons to be issued to compel the mere appearance of a witness, without also compelling him to produce documents or to testify. Pet.s' Brief, pp. 30-33, 38. Inherent in this authority to require a mere appearance, Petitioners contend, is the authority to require that certain non-testimonial acts be done, such as giving handwriting exemplars, voice exemplars, standing in a lineup or trying on clothes for the purpose of identification. Pet.s' Brief, pp. 30-33, 38 n.8; *see also United States* v. *Rosinsky*, 547 F.2d 249, 252 (4th Cir. 1977). However, this is a misreading of the relevant statutes.

Section 7602 has three subsections. Section 7602(1) authorizes the IRS to examine "books, papers, records, or other data." Section 7602(3) authorizes the IRS to take the testimony of a person summoned. Neither of these subsections expressly authorizes the IRS to require non-testimonial acts such as the giving of handwriting or voice exemplars, standing in a lineup or trying on clothes. The only non-testimonial act which the person summoned must perform is the production of books and records. *Cf. Fisher* v. *United States*. 425 U.S. 391 (1976). In connection with the

government's power to examine books and witnesses granted by subsections (1) and (3), Section 7602(2) authorizes the issuance of a summons to compel a person

> *to appear* before the Secretary at a time and place named in the summons *and to produce* such books, papers, records, or other data, *and to give such testimony*, under oath, as may be relevant and material to such inquiry. (Emphasis added).

The structure and literal wording of the statute makes clear that a person's appearance can be compelled only to produce documents or to testify. The giving of handwriting exemplars is not "testimony." *United States* v. *Mara*, 410 U.S. 19 (1973).

Sections 7402(b) and 7604(a) likewise do not support Petitioner's contention. It is true that these sections give the district court jurisdiction to order a person "to appear" in compliance with a summons. However, the courts have interpreted this to mean that the witness may not ignore the administrative summons. That is, he must go before the summoning officer and make some sort of response. The witness may interpose good faith defenses to the summons and wholly refuse to testify or produce documents before the summoning officer. *Reisman* v. *Caplin*, 375 U.S. 440, 445 (1964). If the government wishes to enforce the summons it must seek the aid of the district court. *Id.* at 445-446.

If the witness wholly fails to appear before the IRS in response to the summons, the government may ask

the District Court "for an attachment against him as for a contempt" pursuant to Section 7604(b).[7] However, this statute was "intended only to cover persons who were summoned and *wholly made default* or contumaciously refused to comply." *Reisman* v. *Caplin*, *supra*, at 448-449 (emphasis added). Cf. §§7402(b) and 7604(a) (district court has jurisdiction to compel "attendance").[8] Therefore, the power to compel a person to appear pursuant to an administrative summons does not include the power to compel the person to perform non-testimonial acts other than the production of documents.

E. An Internal Revenue Agent Does Not Have Powers To Compel Non-testimonial Evidence Analogous To Those Of A Grand Jury

Petitioners' reliance upon previous decisions of this Court drawing an analogy between certain aspects of

[7] A willful refusal to appear before the summoning officer may be a crime. 26 U.S.C. §7210; *Reisman* v. *Caplin*, supra at 447; *United States* v. *Becker*, 259 F.2d 869 (2d Cir. 1958).

[8] A similar procedure is in fact what was followed in this case. Respondent not only failed to appear before the Special Agent who issued the summons, he also failed initially to appear before the district court in response to the Order to Show Cause. R. 12, 15. An order for his arrest was issued pursuant to §7604(b). R. 15. He was taken into custody and subsequently released after counsel was appointed to represent him and a date for a hearing was set. R. 16.

grand jury investigations and tax investigations by Internal Revenue agents is inappropriate in this case. As Mr. Justice Stewart pointed out in *United States* v. *Bisceglia*, 420 U.S. 141, 159 (1975) (dissenting opinion):

> The IRS is not a grand jury. It is a creature not of the Constitution but of legislation and thus peculiarly subject to legislative constraints. [Citations omitted]. It is true that the Court drew an analogy between an IRS summons and a grand jury subpoena in *United States* v. *Powell*, 379 U.S. 48, 57, but this was merely to emphasize that an IRS summons does not require the support of "probable cause" to suspect tax fraud [before it may be issued].

This Court made clear in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978) that the power of the IRS to issue an administrative summons under §7602 is more limited than its responsibility to enforce the Internal Revenue Code imposed upon it by §§ 7601, 7801 and 7802.[9] The Secretary is charged with duties that "encompass enforcement of both civil and criminal statutes." *Id.* at 308. Yet the "summons authority does not exist to aid criminal investigations only." *Id.* at 317 n.18. The opinion further reaffirmed

[9] The proximity of the statute authorizing the IRS to canvass, §7601, to the summons statutes is without legal significance. Section 7806(b) explicitly states: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . ."

the principle that the IRS "does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress." *Id.*

Viewed in this context, we submit that this Court should be especially cautious in finding an implied grant of power to agents of the IRS to use methods common to criminal investigations, where the inquiry may lead to use of the evidence in a civil case. *Cf. United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958). This is particularly true where the IRS asserts the right to use those implied powers in situations which lack the procedural and substantive safeguards afforded citizens who are detained by the police or subpoenaed by a grand jury.

A person's constitutional rights are not violated by taking his fingerprints against his will. *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973). Nevertheless, the police may not detain a person for the sole purpose of taking his fingerprints without having probable cause for the detention. *Davis* v. *Mississippi*, 394 U.S. 721 (1969). The IRS, however, may in effect "detain" a person through the use of an administrative summons without the necessity of showing probable cause. *United States* v. *Powell*, *supra* at 57. These "detentions" may be a substantial intrusion upon a person's activities. *Cf. United States* v. *Bassman*, 40 A.F.T.R.2d 77-5990 (S.D. Iowa Sept. 1, 1977) (taxpayer required to furnish 1500 handwriting exemplars, later reduced to 960 exemplars). Yet the summoned

person lacks the not insubstantial safeguards afforded by the Fourth Amendment which would otherwise be available if the police attempted to secure the same nontestimonial evidence.[10]

The use of an administrative summons to compel non-testimonial evidence (except for the production of books and papers) likewise lacks the important historical safeguards afforded citizens by the grand jury system. In the first place, a grand jury is a neutral body. As Mr. Justice Black said in *In re Groban*, 352 U.S. 330, 346-347 (1957):

> The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was commited. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law enforcement officer ferreting out crime. It would be

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[10] For this reason, cases such as *Lewis* v. *United States*, 382 F.2d 817 (D.C. Cir. 1967), *United States* v. *Rudy*, 429 F.2d 993 (9th Cir. 1970) and *United States* v. *McNeal*, 463 F.2d 1180 (5th Cir. 1972) are not apposite here. The existence of a pending criminal prosecution or a finding that a person was in the lawful custody of the police necessarily implies the existence of sufficient probable cause to satisfy the Fourth Amendment. These cases do not suggest that the compulsion of handwriting exemplars would be proper where there was no probable cause to believe the defendant had committed a crime.

> very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them. (Black J., dissenting).

It is true that one of the roles of the grand jury, like that of the Intelligence Division of the IRS,[11] is to investigate suspected crimes. However, the grand jury has an additional role which is not shared by the IRS: to protect individuals against unfounded or malicious criminal accusations. *See* Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 394 (1959). As one court has said, "The Grand Jury earned its place in the Bill of Rights by its shield, not by its sword." *United States* v. *Cox,* 342 F.2d 167, 186 (5th Cir.) (Wisdom, J., concurring specially), *cert. denied,* 381 U.S. 935 (1965). *See also Stirone* v. *United States,* 361 U.S. 212 (1960); *Hale* v. *Henkel,* 201 U.S. 43, 59 (1906). One of the principal reasons for allowing a grand jury to subpoena non-testimonial evidence is to fulfill its purpose as a "shield." As the Court said in *United States* v. *Dionisio, supra* at 17-18:

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not touch upon the legitimate rights of any witness called before it.

The IRS, and particularly a Special Agent in the Intelligence Division, fulfills an entirely different role. The agent's job is to investigate suspected criminal violations and prepare a case for prosecution. R. 30; *see* Internal Revenue Manual 9900, *Handbook for Special Agents* 9900 ¶210 (March 1, 1977). While it is true that a case proceeds through many levels of review before being recommended for prosecution, *United States* v. *LaSalle National Bank, supra* at 315, the overriding purpose of this procedure is to identify the strongest cases for prosecution. Any protection afforded the target of such an investigation by the review process is merely incidental to its primary purpose of deciding which cases should be recommended for criminal prosecution.

The Department of Justice and United States Attorneys actually conduct the trials. 28 U.S.C. §547(1). However, the IRS is hardly a disinterested bystander. As one court has said, "The Department of Justice

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[11] The Intelligence Division has since been redesignated the Criminal Enforcement Division. IRS News Release, February 6, 1978.

depends upon the IRS entirely for the investigation of tax crimes, and all tax prosecutions are undertaken only upon the recommendation of the IRS." *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475 (E.D. Pa. 1971). The Internal Revenue agent who originally investigated the case (and issued the summons, if any) is frequently the principal prosecution witness. *E.g., Scanlon* v. *United States*, 223 F.2d 382 (1st Cir. 1955). In complicated cases, the IRS provides technical assistance to the prosecutors and the grand jury. *See, e.g., In re April 1977 Grand Jury Subpoena*, 573 F.2d 936 (6th Cir.), *rev'd on rehearing en banc*, 584 F.2d 1366 (6th Cir.), *cert. den.*, ____ U.S. ____, 99 S.Ct. 1277 (1978).

Section 7602 contains no sweeping language which evidences a purpose by Congress to grant to the IRS the use of any constitutionally permissible investigative technique to obtain any constitutionally permissible evidence. *United States* v. *Brown, supra* at 122. On the other hand, Congress recently enacted §7609, which placed certain pre-issuance restrictions upon third party and so-called "John Doe" summons. This was done in direct response to the decision in *United States* v. *Bisceglia, supra*, and evidences a Congressional concern that a tax summons "should not unnecessarily impinge upon the civil rights of taxpayers, including the right to privacy." S.Rep. No. 94-938 (Part I), 94th Cong., 2d Sess. 368 (1976). In view of the differing roles of the grand jury and the Internal Revenue agent, it is appropriate to place a more limited construction upon the powers of the latter.

There is a vital difference between the powers the IRS would like to have and the actual powers granted to it by Congress. The desirability of having the power to compel the execution of handwriting exemplars is an argument more properly addressed to Congress, rather than the courts.

If Congress failed to grant the power which the IRS seeks in this case, wheter deliberately or otherwise, that lack cannot be judicially supplied "however much later wisdom may recommend the inclusion." *Frankfurter, op. cit.* at 534. As Mr. Justice Brandeis observed in another tax case: "What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted . . . may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX

Internal Revenue Code of 1954, Title 26, United States Code:

§7402. Jurisdiction of Courts.

(b) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§7210. Failure to Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 7602, 7603 and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§7602. Examination of Books and Witnesses

For the purposes of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liabil-

ity at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§7604. Enforcement of Summons

(a) *Jurisdiction of district court*—If any person is summoned under the internal laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

(b) *Enforcement*—Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Internal Revenue Code of 1939:

§3614. Examination of Books and Witnesses

(a) *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employer of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be

included in the return or of any officer or employee of such person, or in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

(b) *To determine liability of transferee.* The Commissioner, for the purpose of determining the liability at law or in equity of a transferee of the property of any person with respect to any Federal taxes imposed upon such person, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon such liability, and may require the attendance of the transferor or transferee, or of any officer or employee of such person, having knowledge in the premises, and may take his testimony with reference to the matter, with power to administer oaths to such person or persons.

§3615. Summons From Collector to Produce Books and Give Testimony

(a) *General Authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in

which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

* * *

(e) *Enforcement.* Whenever any person summoned under this section neglects or refuses to obey such summons, or give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

§3633. Jurisdiction of District Courts

(a) *To enforce summons.* If any person is summoned under the internal revenue laws to appear,

to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§3654. General Powers And Duties Relating To Collection

(a) *Collectors*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.